Supreme Court, U.S.
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Case No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1999

Allan Rickey Bramlett,

Petitioner,

vs.

United States of America

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether after *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the Government must prove beyond a reasonable doubt that an alleged arson "substantially affected" interstate commerce in order to convict a defendant charged under 18 U.S.C. 844(i)?

2. Whether it was ineffective assistance of counsel in violation of Petitioner's Sixth Amendment rights for Petitioner's counsel in this criminal prosecution for violation of 18 U.S.C. 844(i) to fail to object to the district court's jury instruction that the jury need only find that the Government had proved beyond a reasonable doubt that the alleged arson had a "minimal effect" on interstate commerce since this Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) required the Government to prove beyond a reasonable doubt that the alleged arson had a substantial effect?

3. Whether there was ineffective assistance of counsel in violation of the Petitioner's Sixth Amendment rights because Petitioner's counsel in this criminal prosecution for violation of 18 U.S.C. 844(i) failed to object to the district court's jury instruction that the jury need only find that the Government had proved beyond a reasonable doubt that the alleged arson had a "minimal effect" on interstate commerce since under this Court's decision in *United States v. Lopez* the required nexus between interstate commerce and Section 844(i) had been heightened from a de minimis nexus to a substantial relation to interstate commerce?

4. Whether it was ineffective assistance of counsel for the Petitioner's counsel upon discovery of his error in not objecting to the jury instruction that the Government was required to prove only a minimal effect on interstate commerce to fail to timely file a motion for new trial asserting the *Lopez* case and that failure as error?

5. Whether the district court erred in ruling that damage to "business property" as a result of arson constitutes a per se effect on interstate commerce sufficient in all cases to meet the jurisdictional requirements of the power of Congress to enact criminal legislation under the authority of the Commerce Clause?

6. Whether finding a "substantial relation" to interstate commerce based on aggregating the effects of a generic activity rather than basing the relation on the specific facts of the arson charged in an individual case satisfies the requirements of the *Lopez* opinion?

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OPINIONS BELOW

The Recommendation of the Magistrate Judge, United States District Court, Middle District Of Alabama, dated December 7, 1998, is set out in Appendix A. The order of the United States District Judge, Middle District of Alabama, overruling Petitioner's objections and adopting the Recommendation of the Magistrate Judge, dated December 23, 1998, is set out as Appendix B. The order of the United States District Court, Middle District of Alabama, dated February 9, 1999, denying Petitioner's motion for a certificate of appealability is set out as Appendix C. The order of the United States Court of Appeals denying Petitioner a certificate of appealability, dated October 18, 1999, is set out as Appendix D.

STATUTES INVOLVED

The statutes involved are set out in Appendix E. The statutes are 18 U.S.C. 844(i) and 28 U.S.C. 2253, 2255.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254(1) pursuant to the decision of this Court in *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 1972, 141 L.Ed.2d 242 (1998).

STATEMENT OF THE CASE

Allan Rickey Bramlett ("Petitioner") filed a petition for post-conviction relief pursuant to 28 U.S.C. 2255 in the United States District Court, Middle District Of Alabama on November 2, 1998. The ground of relief asserted in the motion was ineffective assistance of counsel in violation of Petitioner's Sixth Amendment right based on the following:

Petitioner was charged with one count of violating 18 U.S.C. 844(i), the Federal arson statute, to which he

plead not guilty. He stood trial by jury beginning on January 18, 1996. The district court instructed the jury that the necessary nexus between the acts charged and the jurisdictional interstate commerce element would be established if the jury found beyond a reasonable doubt no more than that the conduct of the Petitioner had a "minimal effect on interstate commerce". Petitioner's counsel did not object to this instruction or bring to the attention of the district court *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

The jury convicted Petitioner on January 19, 1996. Petitioner's counsel filed on Petitioner's behalf a motion for new trial which was denied. The Petitioner himself subsequently discovered the Supreme Court decision in *United States v. Lopez*. Petitioner's reading of the case led him to conclude that *Lopez* had amended the jurisdictional standard for determining the required interstate commerce nexus from a "minimal effect" to a "substantial effect". Petitioner called the *Lopez* case to the attention of his lawyer. The lawyer then filed a pleading labeled an "amendment" to the denied new trial motion, claiming that *Lopez* applied to and governed the instant case and that the district court's jury instruction on the required interstate commerce nexus was erroneous. The district court granted the "amended" new trial motion finding that the jury instruction on interstate nexus was erroneous under *Lopez* and that the error in the jury instructions was sufficiently prejudicial to Petitioner to require a new trial.

The Government appealed this ruling. In *United States v. Bramlett*, 116 F.3d 1403, 1406 (11th Cir. 1997), the Eleventh Circuit reversed the district court's grant of a new trial on the sole ground that counsel for Petitioner had not timely filed the successful new trial grounds based on the *Lopez* case within seven days of the verdict as required by Rule 33, Federal Rules of Criminal

Procedure. The court of appeals reinstated the guilty verdict against Petitioner.

Petitioner filed the instant 28 U.S.C. 2255 action based on a claim of ineffective assistance of counsel in violation of Petitioner's Sixth Amendment rights. The specific claims of Petitioner are as follows: (1) counsel was ineffective because he was unaware of the *Lopez* case and did not object to jurisdiction based on it or object at trial to the erroneous jury instruction; and (2) counsel was further ineffective in that he did not timely file the grounds for new trial which were ultimately successful.

Petitioner's 2255 proceeding was referred to a magistrate judge who recommended denial on the ground that there was no ineffective assistance of counsel because the jury was only required to find a minimal effect on interstate commerce and the jury instruction was correct. The magistrate judge's decision was based on *United States v. Viscome*, 144 F.3d 1365 (11th Cir. 1998), *United States v. Chowdhury*, 118 F.3d 742 (11th Cir. 1997), and *United States v. Utter*, 97 F.3d 509 (11th Cir. 1996). The magistrate judge held that whenever destruction of "business property" is involved in an arson case, the "substantial" effect standard of *Lopez* is per se met. He reasoned that since "business" *in the aggregate* has a substantial effect on interstate commerce, then the arson in the instant case which "involved business property" automatically met the *Lopez* "substantial affect" test. (Recommendation of Magistrate Judge ("Recommendation"), attached hereto as Appendix A, pages 4-6.)

Petitioner filed objections to the Recommendation on the ground that the decision of the instant case is governed by the *Lopez* case and that the facts in the *instant* case must meet that "substantial" test and that the decisions in *Viscome, Chowdhury,* and *Utter* are contrary to *Lopez*. Petitioner argued that no *per se* or aggregation rule applied.

The district court rejected Petitioner's objections and adopted the Recommendation of the magistrate judge as the final order in this case on December 23, 1998. Petitioner filed a notice of appeal and made a motion in the district court for the issuance of a certificate of appealability. The district court denied the motion for the issuance of a certificate of appealability. Petitioner then filed a motion for a certificate of appealability in the Eleventh Circuit which was denied on October 18, 1999.

STATEMENT OF THE FACTS

In January of 1993, Petitioner worked for Vinyl Wholesalers, Inc. ("Vinyl Wholesalers"), a corporation that sold vinyl siding for installation on homes and other buildings. On January 13, 1993, Vinyl Wholesalers employee Bill Hendrix arrived for work at the Montgomery showroom shortly after 7 a.m. As he drove into the parking lot, Hendrix observed Petitioner's truck already parked near the showroom, nearly one hour earlier than he ordinarily arrived. When Hendrix left his vehicle, he observed Petitioner emerging from the showroom. Hendrix attempted to enter the showroom, but Petitioner intercepted him and initiated a conversation regarding a problem with the parking lot fence. Petitioner then walked with Hendrix to the parking lot to discuss the problem further. Shortly thereafter, Petitioner indicated that he saw smoke emanating from the showroom building and directed Hendrix's attention to a *small fire* burning within the showroom building. Hendrix started to run toward the backdoor of the showroom, but Petitioner stopped him, explaining that he had smelled kerosene while inside. Hendrix then drove to a nearby service station to summon the fire department.

Firemen arrived and within minutes subdued the blaze. Petitioner explained to one of the firefighters that

he had been in the building prior to the fire, but exited after smelling smoke and kerosene. Investigators for the Fire Department discovered that the fire had been *confined* to a single office in the center of the building. After the showroom had closed on the previous day, it appeared that someone had moved boxes full of records into that office. The investigators determined that the records and the remainder of the room had then been doused in kerosene and ignited using an open flame, such as a match or a cigarette lighter.

On April 11, 1995, a federal grand jury indicted Petitioner for starting the fire that damaged the Vinyl Wholesalers showroom. Specifically, the indictment charged that Petitioner had "maliciously damag[ed] and attempt[ed] to damage and destroy, by means of fire and explosive materials, [a building] used in an activity affecting interstate commerce, in violation of Title 18, *United States Code*, Section 844(i)." (These facts were taken from the court's opinion at 116 F.3d 1405)

REASONS THE WRIT SHOULD BE GRANTED

I.

The Eleventh Circuit Court of Appeals Has Decided In Conflict With This Court's Decision In *United States v. Lopez* That In Prosecutions Under 18 U.S.C. 844(i) The Interstate Commerce Element Of The Offense Is Established By Proof That The Property Or Activity Affected Had A Minimal Effect On Interstate Commerce

In the paradigm ineffective assistance of counsel decision, *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court established a two prong test for determining Sixth Amendment ineffective assistance of counsel: (1) deficient performance of counsel; and (2) prejudice to the defendant resulting therefrom. Petitioner has alleged that his counsel did not know of the *Lopez* case and its effect on Petitioner's trial

and thus failed to object to a jury instruction that the district court ruled was sufficiently prejudicial to require a new trial. Petitioner naturally argues that it was deficient performance for a lawyer holding himself out as competent to practice Federal criminal law to be unaware of the *Lopez* case and its application to and effect on Petitioner's case. The district court held that the failure to object to the jury instruction was sufficiently prejudicial to require a new trial when *Lopez* was belatedly called to his attention by Petitioner's negligent counsel. Therefore, if the instruction was indeed error, ineffective assistance is established.[1]

This Court in *Lopez* struck down the Gun-Free School Zones Act which criminalized the knowing possession of a firearm in a school zone. (514 U.S. at 551-552) The Court listed three broad categories of activity which Congress could regulate pursuant to the Commerce Clause: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities which have a substantial relation to interstate commerce, defined as those activities which "substantially affect interstate commerce." (514 U.S. at 559)

The provisions of 18 U.S.C. 844(i) make it a Federal crime to damage or destroy, or attempt to damage or destroy, by means of fire or an explosive device buildings,

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[1] The requirement of Rule 33, FRCrP, that new trial grounds must be filed within seven days of the verdict or to a time to which the district court has during this initial seven day period extended such time is basic knowledge a lawyer must have to function in criminal proceedings in Federal court. The failure of Petitioner's lawyer to file within the time allowed is clearly deficient performance. Moreover, the prejudice seems beyond dispute since the belated filing of the *Lopez* ground succeeded in getting a new trial for Petitioner, which was lost only because the filing was belated. Clearly, then, the only real issue in this 28 U.S.C. 2255 proceeding is the correct interpretation of *Lopez*.

vehicles "or other real or personal property" that is "used in" or "affecting" interstate or foreign commerce.

Prior to *Lopez*, in *Russell v. United States*, 471 U.S. 858, 862, 105 S.Ct. 2455, 85 L.Ed.2d 829 (1985), the Court considered the scope of 844(i) in a case involving the arson of a two-unit apartment building. The decision was that Congress intended to protect all business property, as well as some additional property that might not fit that description, but perhaps not every private home." *Lopez* implicitly modified *Russell*.

In *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), the court held that *Lopez* had altered the legal landscape so that since 844(i) does not fall within one of the first two categories established by *Lopez*, it depended for its validity on the third category's requirement of applying only to property "substantially affect[ing] interstate commerce." (64 F.3d at 526) The Government argued in that case that in order to qualify business property need only be used in activity that in the aggregate affects interstate commerce. *Pappadopoulos* rejected this argument.

The Eleventh Circuit decided *United States v. Denalli*, 73 F.3d 328, (11th Cir.), modified 90 F.3d 444 (1996) adopting the "substantial affect" interpretation of *Lopez* and *Pappadopoulos* as applied to 844(i) and holding that a conviction under the statute is valid only if the property at issue was used in an activity that had "a substantial effect on interstate commerce." (90 F.3d at 444)

However, the Eleventh Circuit has since *Denalli* rejected this correct interpretation of *Lopez*. In *United States v. Chowdhury*, 118 F.3d 742, 745 (11th Cir. 1997) (per curiam) the court held that if business property is the object of an 844(i) prosecution, the property at issue need only be used in an activity that *in the aggregate* has a substantial effect on interstate commerce. The court then adopted a *per se* rule that business property would

always meet the jurisdictional nexus "because business property will almost inevitably be an element of a much broader commercial market." (*Id*)

In *United States v. Dascenzo*, 152 F.3d 1300, 1302 (11th Cir. 1998), the Eleventh Circuit decided that because 844(i) contains language requiring that the crime or the property involved in the crime "be connected in *some way* to intestate commerce" it is not necessary for the Government to establish in a prosecution under the statute that "the property underlying each case was used in an activity that substantially affects interstate commerce." In a footnote, the court explained that the term "activity" was causing much confusion in applying the *Lopez* decision. The court attempted to straighten out this "confusion" by differentiating between "activity" as a constitutional law term and as a criminal law term. The court explained that the term "activity" was used in *Lopez* in the constitutional sense meaning "that the entirety of the 'activity' regulated by the statute must 'substantially affect' interstate commerce" (*Id.* at n. 6) Accordingly, the court concluded, *Lopez* does not use "activity" in the criminal law sense and so "does not require a substantial effect on interstate commerce to result from each individual criminal act or from the specific property involved in each criminal act." (*Id.*) The court agreed in this footnote, however, that "In the criminal law context, section 844(i) itself also expressly uses the term 'activity'. But 'activity' in the statute is used in a different, narrower sense: to refer to the actual property impacted on by the criminal act at issue." (152 F.3d n. 6 at 1303) No authority is cited for these conclusions in the footnote.

The court concluded that while the regulated activity must have a "substantial effect" on interstate commerce, it is "no element of the crime." (152 F.3d at 1303) The jury need only find what the language of the statute requires to convict-that the Government establish "a mini-

mal connection between the property at issue and some aspect of interstate commerce." (*Id.* at 1304)

This holding is in violation of *Lopez*. The regulated subject under 844(i) is not the property itself, but the arson or destruction of such property. *United States v. Gaydos*, 108 F.3d 505, 508 (3rd Cir. 1997) and *United States v. Pappadopoulos*, 64 F.3d 522, 526 (9th Cir. 1995) (arson, the conduct regulated by 844(i), is not commercial or economic in nature) The Eleventh Circuit holding in *Dascenzo* is that under *Lopez* Congress may not enact legislation criminalizing the arson or destruction of property that does not have a substantial relation to interstate commerce, but a defendant can be convicted under that legislation of arson or destruction of property that has only a minimal relation to interstate commerce. This holding is wrong because it overlooks the requirement that the elements of a criminal offense be contained in the statute creating the offense or is capable of being inferred therefrom. The power of the Congress to enact a statute must obviously depend on the content of that statute. The content must be consistent with the power of Congress to pass it. This is axiomatic. Therefore, the elements of a criminal statute which the Government must prove beyond a reasonable doubt to obtain a constitutionally viable conviction must be consistent with the power of Congress to pass the statute.

It is not clear in *Dascenzo* how it perceives that Congress can broaden its power under the Commerce Clause merely by putting a provision in the statute that it applies to "any" property or activity "used in" or "affecting interstate or foreign commerce." (152 F.3d at 1302) ("By its very terms, section 844(i) is limited to property 'used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. So, it would seem that this statutory element removes section 844(i) from the constraints of the 'substantial effect' standard

established in *Lopez*.) Why is this so? *Dascenzo* does not explain. Why does Congress stating in a statute that the statute affects any property or activity "minimally" affecting interstate or foreign commerce transcend the constitutional limitation on Congressional power to legislate only with regard to property or activities that "substantially" affect interstate commerce?

The *Dascenzo* rationale is irrelevant to a criminal prosecution because the very object of 844(i) is not to regulate commercial activities, but to criminalize certain conduct, arson or destruction, of certain property. Congress has chosen to act under the Commerce Clause to do so. The criminal conduct is clear enough. What is at issue is when the conduct is constitutionally a Federal crime as opposed to a State crime? The crime will be punished. The question is what sovereign may constitutionally do so. *Lopez* answered this question by saying that Congress may not do so unless the property or activity affected had a substantial effect on interstate commerce.

The nature of the "aggregate effects" test imposed in *Dascenzo* is not clear since the opinion apparently excludes purely private homes. (152 F.3d 1303) However, the commercial activities related to purely private homes, the "aggregate effects," such as construction, financing, selling, maintaining, etc., in the aggregate have an enormous effect on interstate commerce. One need only look at what happens when a purely private home is burned or destroyed — mortgage payments are interrupted, lenders' and depositors' interests are lost, threatened, or deferred, insurance companies are required to pay large sums, construction companies become involved in rebuilding, public safety equipment and employees must be financed through bonds and other incursions into the financial markets affecting interest rates, and a plethora of other effects result. Therefore, logical application of the "aggregate effects" test means that there is not a

single building in the United States outside the ambit of 844(i). The same is true of "activities". It is difficult to imagine a "purely private" activity that in the aggregate does not in and of itself, or through related activities, substantially affect interstate or foreign commerce. The logical end result of the "aggregate effects" test is to remove all limits on congressional power under the Commerce Clause and make *Lopez* a meaningless decision outside the specific statute it declared unconstitutional.

In fact, *Dascenzo* in its conclusion simply removes the constitutional qualifiers "interstate" and "foreign" and holds " . . . sufficient evidence was presented to satisfy the statutory requirement that the property be used in an activity affecting commerce. The criminal law was satisfied." (152 F.3d at 1304) This holding illustrates the inevitable result of the "aggregate effects" theory-unlimited congressional power under the Commerce Clause contrary to *Lopez*. *United States v. Corona*, 108 F.3d 565, 570 (5th Cir. 1997) ("Taking the "effects test" to its logical extreme would for all practical purposes grant the federal government a general police power, the very danger the *Lopez* Court warned us against.")

Moreover, the Eleventh Circuit has ignored that part of the *Lopez* opinion stating that when, as in the case of 844(i), a Federal statute contains a jurisdictional element reflecting Congress's intent to regulate interstate commerce, a case-by-case inquiry remains necessary to maintain the limits on Federal power. (514 U.S. at 561-563) It has also ignored this Court's warnings that it will not allow the conversion of "Congressional Commerce Clause authority to a general police power of the sort held only by the States." (514 U.S. at 549-550) Instead of following *Lopez*, the Eleventh Circuit has effectively converted the Commerce Clause into a general police power for the Federal Government.

The decision in *Lopez* inserted the word "substantially" in its formulation of the "effects test" to require the Federal courts to scrutinize the Congress's commerce power and "dispelled the notion that de minimis connections to interstate commerce can legitimate federal legislative powers." (*United States v. Corona*, 108 F.3d at 569) The jurisdictional element in 844(i) may protect it from a facial challenge, but it does not protect it from the case-by-case analysis which Petitioner seeks in the instant case. The case-by-case inquiry required by *Lopez* must be whether a particular defendant has done something Congress has the power to proscribe by legislation. The aggregate effect of arsons in commercial buildings may have a substantial effect on interstate commerce, but if each arson in the aggregation is negligible, such as that in the instant case, the calculation of their effect becomes speculative. *Lopez* held that the effect of gun possession near schools was impermissibly speculative. *Lopez* prohibited such speculation as a basis for a criminal conviction.

Thus, the Eleventh Circuit has decided *Dascenzo* contrary to *Lopez* and has erroneously denied Petitioner a certificate of appealability based on that decision. The Eleventh Circuit must be reversed

II.

The Eleventh Circuit Denied Petitioner A Certificate Of Appealability Based On Legal Decisions Contrary To The *Lopez* Decision

The instant arson only marginally bore even *a de minimis* relationship to interstate commerce. Records were burned in a room in a building used by a small local company doing minor damage to the room. The blaze was extinguished in minutes. Investigators for the Fire Department discovered that the fire had been confined

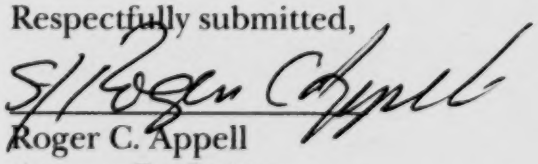
to a single office in the center of the building. The substantial relationship to interstate commerce required by *Lopez* is not present in the instant case.

The jury was erroneously instructed that it need find only a minimal relationship to interstate commerce in order to convict Petitioner. Petitioner's counsel was clearly ineffective in failing to bring the *Lopez* case to the attention of the district court and to object to the erroneous jury instruction. The prejudice to Petitioner from the erroneous instruction requiring a new trial has already been decided by the district court in this case. Therefore, Petitioner has made a substantial showing of the denial of a constitutional right and is entitled to the certificate of appealability. 28 U.S.C. 2253(c)(2) The Eleventh Circuit has erroneously denied the certificate of appealability contrary to the *Lopez* decision and must be reversed.

CONCLUSION

Petitioner made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. 2253(c)(2). A certificate of appealability was erroneously denied. This Court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability. *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 1971, 141 L.Ed.2d 242 (1998) The writ should be issued in the instant case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I have this 18 day of January, 2000, served a copy of this Petition For A Writ Of Certiorari on the United States Attorney, Middle District Of Alabama and on the Solicitor General of the United States, postage prepaid and properly addressed.

S/ Roger C. Appell

Roger C. Appell

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 95-84-N
	)	
ALLAN RICKEY BRAMLETT.	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

A Grand Jury in the United States District Court for the Middle District of Alabama returned an indictment against Allan Bramlett on January 13, 1993, charging the defendant with maliciously damaging and attempting to damage and destroy, by means of fire and explosive materials, a building used in an activity affecting interstate commerce, in violation of 18 U.S.C. § 844(i). Following a jury trial, the defendant was convicted on the charges.

On March 25, 1996, following the defendant's conviction but prior to sentencing, the defendant filed a motion for new trial arguing that the burden of proof required in cases involving 844(i) had been changed due to new case law. On April 23, 1996, this court granted the defendant's motion for a new trial and set aside the jury verdict rendered on January 23, 1996. The government appealed this court's ruling and on June 10, 1997, the Eleventh Circuit Court of Appeals vacated the district court's April 23, 1996 order and remanded it back to this

court for reinstatement of the jury's verdict. In making this ruling, the Eleventh Circuit found that the district court did not have jurisdiction to grant the motion for new trial because it was filed outside the seven day time period allowed for such motions under Rule 33, *Federal Rule of Criminal Procedure.*

On November 2, 1998, the defendant filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. As grounds for relief the defendant claims that, based upon *United States v. Lopez,* 514 U.S. 549 (1995), and *United States v. Denalli,* 73 F.3d 328 (11th Cir. 1996), the court did not have jurisdiction to convict him under 844(i). The defendant further argues that his counsel was ineffective for failing to cite the district court to *United States v. Lopez,* 514 U.S. 549 (1995), failing to file a motion for new trial due to jury instructions that were erroneous based on *Lopez,* and failing to file a motion to dismiss based upon the district court's lack of jurisdiction under *Lopez.*

Upon review of the motion and the various pleadings filed in this case, the court concludes that this case is due to be dismissed pursuant to Rule 4(b), *Rules Governing Section 2255 Proceedings for the United States District Courts.*

DISCUSSION

In *United States v. Lopez,* 514 U.S. 549 (1995), a student was charged and convicted of violating the Gun-Free School Zones Act of 1990 when he carried a concealed handgun into his high school. The Gun-Free School Zones Act forbid "any individual knowingly to possess a firearm at a place that he knows . . . is a school zone." 1 U.S.C. § 922(q)(1)(A). The student appealed his conviction and the Supreme Court held that the Gun-Free School Zones Act exceeded the authority of Congress because it neither regulated a commercial action nor contained a requirement that the possession be

connected in any way to interstate commerce. *Lopez* at 551. The court identified three broad categories of activity that Congress may regulate under its commerce power. *Id.* at 558. Congress may regulate the use of channels of interstate commerce, it may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities, and Congress may regulate those activities having a substantial relation to interstate commercial. The court noted that the proper test requires an analysis of whether the activity "substantial affects" interstate commerce. *Id.* at 559.

The defendant argues that although *Lopez* was decided before his trial commenced, the trial judge's instructions to the jury included an analysis of whether his activity had a minimal affect on interstate commerce rather than the "substantially affects" analysis required under *Lopez.* The defendant argues that based upon *Lopez,* the court had no jurisdiction over a case involving an activity that had a minimal affect on interstate commerce, and his counsel was ineffective for failing to raise this claim and failing to cite the court to *Lopez.*

Essentially the arguments presented by the defendant have been reviewed by the Eleventh Circuit Court of Appeals in *United States v. Viscome,* 144 F.3d 1365 (11th Cir. 1998), and *United States v. Utter,* 97 F.3d 509 (11th Cir. 1996). In *Viscome,* the defendants were charged with violating 18 U.S.C. § 2332a(a)(2), and 18 U.S.C. § 844(i). The defendants in that case, like the defendant here, argued that the Eleventh Circuit's decision in *United States v. Denalli,* 73 F.3d 328 (11th Cir.), modified, 90 F.3d 444 (11th Cir. 1996), which is based upon the Supreme Court's decision in *Lopez,* controlled the disposition of their case. Specifically, the defendants argued that the government was required to show that the truck

involved in the alleged criminal activity, was used in an activity that substantially affected interstate commerce.

Denalli involved the destruction of a private residence and the government's assertion that the homeowner's occasional use of a personal computer in the house affected interstate commerce because the use concerned his work as an electrical engineer for a company that engaged in interstate and international business. *Denalli* at 330. The Eleventh Circuit held that the evidence did not establish a substantial affect on interstate commerce.

The court in *Viscome* noted that subsequent to *Denalli*, which involved a private residence, the court has indicated that if business property is involved, then the property need only have been used in an activity that in the aggregate has a substantial affect on interstate commerce. *Viscome* at 1368; *United States v. Chowdhury*, 118 F.3d 742, 745 (11th Cir. 1997). In *Chowdhury*, the court explained that a "case concerning the destruction of business property, when considered in the aggregate, would have a substantial affect on interstate commerce because business property will almost invariably be an element of a much broader commercial market." *Id. citing Russell v. United States*, 471 U.S. 858, 862 (1985). Therefore, while the court avoided addressing the scope of *Denalli* by finding that the evidence was sufficient to sustain the conviction, the court did show the inherent differences in analysis when the case involves business property rather than the personal property that was at issue in *Denalli*.

In *United States v. Utter*, 97 F.3d 509 (11th Cir. 1996), a restaurant was destroyed by fire and the owners was convicted of mail fraud and arson in violation of 18 U.S.C. § 371, mail fraud in violation of 18 U.S.C. § 1341, arson in violation of 18 U.S.C. § 844(i), and using fire to commit federal felony offenses in violation of 18 U.S.C. § 844(h). The defendant argued that the arson convic-

tion was unconstitutional in light of the United States Supreme Court's decision in *United States v. Lopez,* 514 U.S. 549 (1995). Specifically, the defendant argued that the evidence failed to establish the jurisdictional prerequisites of the federal arson statute. *Utter* at 514. The court compared the factual situation in *Denalli* with the situation in *Utter,* noting that under the circumstances in *Utter,* the requisite connection to interstate commerce was apparent. The court referred to the restaurant's use and sale of products that originated outside the state of Florida. *Utter* at 516. In addition, the court continued the analysis that it had begun in *Denalli,* focusing on the difference between business and personal property.

The defendant's case is similar to that of *Utter* in that, in contrast to *Denalli,* the case involves a business rather than a private residence. The defendant was convicted of arson of the building at 215 Whitman Street, in Montgomery, Alabama. The record before the court shows that the place where the defendant committed the arson was a business which utilized or produced goods and materials which were shipped in interstate commerce. Thus, as in *United States v. Utter,* 97 F.3d 509 (11th Cir. 1996), the requisite connection to interstate commerce is apparent. Accordingly, the defendant's argument that this court did not have jurisdiction to decide this matter in light of the Supreme Court's decision in *Lopez* and the Eleventh Circuit's decision in *Denalli,* is without merit. It is clear that the jurisdictional prerequisites of 18 U.S.C. § 844(i) were met.

The defendant also argues that counsel was ineffective for failing to raise, at various stages of the trial and on appeal, all of his claims related to the court decisions in *Lopez* and *Denalli.* The Sixth Amendment right to counsel exists to protect the fundamental right to a fair trial. The defendant must satisfy the requirements of a two-

pronged test to prevail on his claim of ineffective assistance of counsel. He first must establish that his attorney's performance "fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668, 688 (1984). "The proper measure of attorney performance remains simply reasonableness under prevailing norms." *Strickland,* at 688. Once this threshold test is met, the defendant must then show that the deficient performance of his counsel prejudiced his defense. *Strickland, supra* at 687.

To establish prejudice, the defendant must first show that there is "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Strickland,* at 694. However, a defendant does not establish "prejudice" merely by demonstrating that but for counsel's behavior the outcome would have been different; rather, defendant must also show that counsel's performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Lockhart v. Fretwell,* 506 U.S. 364 (1993). Based upon the discussion above, it is clear that the defendant's arguments based upon the law in *Lopez* and *Denalli,* have no merit. Accordingly, the defendant has failed to establish that his counsel was ineffective for failing to raise issues tied to *United States v. Denalli,* 73 F.3d 328 (11th Cir.), modified, 90 F.3d 444 (11th Cir. 1996) or *United States v. Lopez,* 514 U.S. 549 (1995) at any juncture in the trial or on appeal. *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *Simmons v. Wainwright,* 710 F.2d 796, 797 (11th Cir. 1983) (No prejudice exists if the error that counsel fails to raise is not reversible error).

CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that the defendant's motion for relief

pursuant to 28 U.S.C. § 2255 be denied. It is further the RECOMMENDATION of the Magistrate Judge that the costs of this proceeding be taxed against the defendant.

Done this 7th day of December, 1998.

/s/ Charles S. Coody

UNITED STATES MAGISTRATE JUDGE

APPENDIX B

CR. NO. 95-84-N

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright,* 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities, Inc.,* 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Pritchard,* 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 7th day of December, 1998.

/s/ Charles S. Coody

UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	CR. NO. 95-84-N
	)	
ALLAN RICKEY BRAMLETT.	)	

ORDER

This cause is now presented to the court on the Recommendation of the Magistrate Judge, filed December 7, 1998; defendant's objections thereto, filed December 17, 1998; and the United States' response to defendant's objections, filed December 18, 1998.

The court has carefully read the recommendation and objections and is of the opinion that said recommendations are well taken and are due to be adopted, approved and affirmed. It is, therefore,

CONSIDERED, ORDERED and ADJUDGED as follows:

1. That defendant's objections be and the same are hereby OVERRULED;

2. That the Recommendation of the Magistrate Judge in this cause be and the same is hereby ADOPTED, APPROVED and AFFIRMED.

3. That defendant's motion for relief pursuant to 28 U.S. C. § 2255 be and the same is hereby DENIED; and

4. That the costs of this proceeding be and are hereby taxed against the defendant for which let execution issue.

DONE this the 23rd day of December, 1998.

/s/ Ira DeMent

UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	CR. NO. 95-84-N
	)	
ALLAN RICKEY BRAMLETT,	)	
	)	
Defendant.	)	

ORDER

Upon CONSIDERATION of defendant Allan Rickey Bramlett's motion for certificate of appealability, filed February 8, 1999, and the record developed prior to defendant's notice of appeal, the court determines that any appeal from its decision in this action is frivolous and not taken in good faith within the meaning of *Coppedge v. United States*, 369 U.S. 438 (1962) and 28 U.S.C. § 1915, and by this order the court so certifies.

Accordingly, it is CONSIDERED and ORDERED that defendant's motion for a certificate of appealability be and the same is hereby DENIED.

DONE this 9th day of February, 1999.

/s/ Ira DeMent

UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-6010-A

ALLAN RICKEY BRAMLETT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

ORDER:

Upon review, Appellant's request for a certificate of appealability pursuant to 28 U.S.C. § 2253 is hereby DENIED. Appellant has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. §2253(c)(2).

/s/ Stanley Marcus
UNITED STATES DISTRICT JUDGE

APPENDIX F

USCA — 18 USCA § 88(i)

(i) Whoever maliciously damage or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or any an activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

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28 U.S.C.

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issued under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(June 25, 1948, c. 646, 62 Stat. 976; May 24, 1949, c. 139, § 113, 63 Stat. 105; Oct. 31, 1951, c. 655, § 52, 65 Stat. 727; April 24, 1996, Pub.L. 104-132, Title I, § 102, 110 Stat. 1217.)

28 U.S.C.

§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion

pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making amotion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be suffi-

cient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105; Apr. 24, 1996, Pub.L. 104-132, Title I, § 105, 110 Stat. 1220.)